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THE

CASE OF THE TRENT

EXAMINED.

ADHUC SUB JUDICE LIS EST.

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BY
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THE CASE OF THE "TRENT" EXAMINED.

In the midst of that violent controversy which has been lately carried on with respect to the question of international law now occupying all minds, it has appeared to me that while those who may be called the Trent party were examining the question, in a hostile spirit, indeed, and with heated blood, but yet with sufficient coolness to allow them to discuss the matter on grounds of reason, the American party has been so carried away by temper, that they have blundered their own case, while instead of seeking to justify themselves by international law, they have only been looking out for a *tu quoque* argument, and have appeared more anxious to maintain the act as illegal by an illegal precedent, than to prove their act to have been legal by reasons of law. But it seems fit that we should not rest content with exploding those alleged precedents, but should also know what is to be said on their side, and if we are acting like a wise and generous nation, who can by sympathy imagine themselves in the place of their neighbour, and by prudence anticipate such an event as possible, we shall not set ourselves to demand judgments and dicta which will cover the exact circumstances of

the present case with a direct affirmative or negative decision, but shall be ready to examine and discuss the matter on broad grounds of principle. With a desire to promote such a discussion, I will, although an Englishman, shortly indicate the reasoning on which, as I conceive, American jurists might propose to rest their case; that, if it will not bear the test of examination, some more satisfactory answer may at least be given through the public press, than has yet appeared.

The case may be stated thus:—A neutral vessel, voyaging homewards from a neutral port, and carrying commissioned envoys from one belligerent to their destination, was stopped on the high seas by a ship of war of the other belligerent, and the envoys were forcibly removed, the vessel being allowed to proceed on her voyage. That the question is to be treated as arising in a state of war appears to have been almost universally conceded, and cannot be with any semblance of justice denied; that there was therefore a right of visit and search is manifest. The question is only as to the further proceedings.

First, let these principles be laid down with respect to the right of belligerents to do anything beyond such visit and search. That the destination of a neutral vessel to a hostile port does not alone justify a detention, even for the purpose of bringing the vessel in for examination, is clear. That the destination of a vessel to a hostile port is not necessary

to justify such a detention, is also clear, from the cases of the "Atalanta", 6 Rob. 440, the "Constantia", the "Susan", and the "Hope", 6 Rob. 461 (*n*), and the "Madison", Edw. 224,* which completely answer the argument that has been raised on a misapplication of the case of the "Imina", 3 Rob. 167.† A neutral vessel, therefore, proceeding to a neutral port, may be liable to such detention, and even to forfeiture; as in several of the cases cited. But

* *The Atalanta* was on its way to Bremen, a neutral port, and at the Isle of France, to which it was driven by stress of weather, it took in dispatches from the Government of the island to the French Government.

The Constantia was proceeding from the Isle of France to Copenhagen, carrying dispatches, to be delivered to the French Ambassador there, and to be by him forwarded to the French Government.

The Susan was proceeding from Bourdeaux to New York, and carried a packet of dispatches addressed to the Prefect of the Isle of France.

The Hope was bound to New York from Bourdeaux, and carried dispatches from the French Government to Officers of the French West Indies, and the Isle of France, and a military Officer.

The Madison was a vessel carrying homewards dispatches of a hostile Government (the Danish) to its Consul, resident in America.

The first four were confiscated—the fifth restored on payment of expenses ; the last case is noticed on a subsequent page.

† Where Lord Stowell refused to confiscate a vessel, which, on hearing that a hostile port to which it was carrying ship-timber, was blockaded, changed its destination to a neutral port, and was taken while pursuing the latter course.

what in either case justifies such a detention? In the first case, (*i.e.* where the destination is hostile) the carriage of any kind of contraband of war will justify it; and, whether, in the second case, the carriage of contraband being in the nature of munitions of war will justify it or not, the carrying of hostile dispatches will certainly render the ship liable to both detention and forfeiture (as in the cases of the "Atalanta", the "Susan", and the "Hope"). The question next arises, whether dispatches from a hostile Government to its Ambassador or Agent, resident with a neutral power, are contraband or not. If *primâ facie* contraband, as dispatches from a hostile power to his ally or dependency, they would forfeit the ship; but, according to Lord Stowell's judgment in the "Caroline", 6 Rob. 461,* they are *primâ facie* of a neutral character, since the neutral has a right to preserve his relations with the enemy, and, "it might be thought to amount almost to a declaration, that an Ambassador from the enemy shall not reside in the neutral state, if he is declared to be debarred from the only means of communicating with his own government. For to what useful purpose can he reside there, without the opportunities of such a communication? It is too much to say, that all the business of the two States shall be transacted by the Minister of the neutral

* *The Caroline*, proceeding from New York to Bourdeaux, carried dispatches from the French consul, resident in America, to the French Government.

State, resident in the enemy's country." The master of the vessel is therefore innocent, and his ship is not liable to forfeiture; but yet he is not entitled to go absolutely free; for, "It has been argued truly, that whatever the necessities of the negociation may be, a private merchant is under no obligation to be the carrier of the enemy's dispatches to his own Government. Certainly he is not: and one inconvenience, to which he may be held fairly subject, is that of having his vessel brought in for examination, and of the necessary detention and expense"—(*i.e.* the expense of both the captor and himself, *vide* the "Madison," Edw. 224). This, then, is the risk which the owner of a neutral vessel incurs, when he undertakes to carry articles of such a nature. In the case of the "Caroline," however, the vessel was carrying dispatches from the hostile Ambassador to his Government. Can the case be different, where the dispatches are carried from the hostile Government to its Ambassador? On principle no difference can be shewn; in the one case, as in the other, they are, by Lord Stowell's reasoning, alike *primâ facie* innocent; they may be in fact equally noxious. Again, the usual mode of making communications to foreign Governments is through the Ambassador of the power making the communication; it would therefore be an imperfect and one-sided application of the principle, to say, that communications from the hostile Government to its Ambassador are fully privileged, while the dispatches from the hostile Ambassador to

his Government render the vessel carrying them liable to detention. And further, "it must be considered also with regard to the question, what may be due to the convenience of the neutral State;" the neutral, therefore, may require as high an immunity for the dispatches of the hostile Ambassador to his Government, which may contain the answers of the neutral to communications made to him by such Ambassador, as is accorded to the dispatches of the hostile Government to its Ambassador; but the former communications, in the case of the "Caroline," render the vessel liable to arrest; the dispatches therefore of a hostile Government to its Ambassador will cause the same risk to be incurred. The privilege which makes them *primâ facie* innocent, exists equally in both cases; and in both cases, the liability is co-extensive with the privilege. I have reasoned it thus in order to exhibit the principle more clearly, but that the rule applies equally in both cases, is shown by the case of the "Madison" before cited. But did the presence of the Southern envoys subject the vessel carrying them to the same rule? Since there is no precedent directly in point, the question must be decided by analogous reasoning. Doubtless this is not a time when the principles of international law should be harshly strained to extend the rights of belligerents, and if any peculiar hardship can be shown to be inflicted on the neutral, by extending acknowledged principles to new cases, (beyond that amount of additional inconvenience which must necessarily belong to every extension,

by the very fact that a new case is included), the argument would have weight; but where none such is shown, the argument is of no avail, and the belligerent is entitled to the full benefit of the principles already laid down. By the reasoning then of the "Orozembo," 6 Rob. 434-5, and of the "Atalanta," 6 Rob. 454, we are forced to conclude, that hostile envoys, sent with a hostile purpose, are no less liable to seizure than dispatches of a similar nature, and that they none the less render the vessel carrying them liable to forfeiture. That such a hostile character may exist in them, although not military persons, is shown from Lord Stowell's reasoning in the analogous case of dispatches, in the "Atalanta;" where he argues most justly, that measures which are calculated to further the very objects of the war, are equally noxious with distinctly military dispatches; "it is not to be argued," he says, "that the importance of these dispatches might relate only to the civil wants of the colony, and that it is necessary to show a military tendency; because, the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered in the contemplation of law as an object of hostility, although not produced by operations strictly military." It is shown also by his reasoning in the case of the "Orozembo," 6 Rob. 429,* when he

* Which carried hostile (Dutch) officers from Lisbon (a neutral port) to Batavia. Some of the officers were civil, and some military.

says, speaking of the rule by which carrying military officers of the enemy rendered the vessel liable to confiscation, "whether the principle would apply to them (the civil officers) alone, I do not feel it necessary to determine. I am not aware of any case in which that question has been agitated; but it appears to me, on principle, to be but reasonable that, whenever it is of sufficient importance to the enemy, that such persons should be sent out on the public service, at the public expense, it should afford equal grounds of forfeiture against the vessel that may be let out for a purpose so intimately connected with hostile operations."

Therefore, if these envoys had been journeying on a hostile errand, to an ally or dependency of the South, they might, under some circumstances, have rendered the vessel liable to forfeiture. Since, then, envoys, as well as dispatches, may be hostile, the presence of envoys, no less than of dispatches, will render the vessel carrying them liable to detention. If, therefore, these envoys had been proceeding on their voyage to an ambassador from the South, resident in England, the vessel carrying them might have been detained for examination; for there is no less ground to infer the possibility, or probability, of the hostile purposes and effects of a public envoy, than of those of a bundle of dispatches; and it is *this* inference which, according to Lord Stowell's reasoning, gives the right. Does the fact that there was no such ambassador here alter the matter? I

cannot conceive that it does. Rather, since there were no regular communications established, and there was no independent sovereign power with whom the neutral could wish to preserve his ordinary communications, there was the less reason for the privilege, but also the more for the liability; because the more reason to infer, or rather the more necessity to infer, hostile intentions, from acts which directly tended to further that which was the very object of the war.

But probably an American would still further rely on the dictum contained in the often-quoted case of the "Caroline"—"You may stop the Embassador of your enemy on his passage." This cannot be rejected; for it occurs in the course of the reasoning by which Lord Stowell established that the dispatches were *primâ facie* innocent, although they rendered the vessel carrying them liable to detention. Those who assert that it is merely an obiter reference to the passage in Vattel, so much dwelt on lately, make Lord Stowell do what was not according to his custom, speak beside the mark. The course of his argument is clear, and this sentence forms part of it. Belligerents, he reasons, may preserve the communications once opened, but no privilege exists to restrain you from hindering their commencement. Although the establishment of ambassadorial relations may be prevented, yet those relations, once established, create a certain privilege; "you may exercise your

right of war against them (the enemy's ambassadors) wherever the character of hostility exists;" and these are the "limits that are assigned to the operations of war against them." Where, then, does this character of hostility exist? Wherever the character of neutrality does not; and what are the limits of the latter is shown by what follows: "but when he has arrived, and has taken upon himself the functions of his office, and has been admitted in his representative character, he becomes a sort of middle man, entitled to peculiar privileges, as set apart for the protection of the relations of amity and peace, in maintaining which all nations are, in some degree, interested:" clearly implying, that when he has not arrived, no such privilege exists. His character of neutrality only arises on his becoming fully an Ambassador, and then his position is conclusive as to his own personal neutrality, and gives rise to a presumption in favour of dispatches to and from him. But "you may stop the Embassador of your enemy upon his passage;" you may perform an operation of war, you may exercise your right of war *against him*, until he has arrived at his destination. But what is an operation of war against a person? It would be no operation of war against a private subject of a hostile power, to bring in the neutral vessel on which he was travelling, on the ground that it was carrying contraband of war; nor would he be personally detained, except in so far as he was hindered from prosecuting his journey

in that ship. To do such an act against an individual, it must be done against himself personally, on the ground of some character or act which he sustains or does. When, therefore, an act of war against an ambassador is spoken of, and the stopping him on his passage is given as an instance, that stoppage must be, not a stoppage incident to the stoppage of the vessel for some other cause, (which would be an allowable act though he had attained his maximum of privilege), but the stopping *him;* not indeed in his character as Ambassador merely, which, so far as it goes, is a neutral character; but on the ground of some character of hostility existing in him, the possibility of which is thus shown not to be excluded by his inchoate character of Ambassador. Yet it is impossible to suppose that such an Ambassador should be going on a strictly military errand; his hostile character must therefore be of another kind, such as the being engaged in a mission which has some direct bearing on the objects or issue of the war, tending to thwart and oppose the acts of war of the other belligerent, and to obtain some military advantage in the contest. But whatever applies to Ambassadors, applies also to Envoys, with this difference only, that the latter, without having the special privileges of the former, can incur all their liabilities. You may then in any case detain the Envoy of your enemy proceeding to his destination, and if his mission is hostile you may continue to detain him.

Nor can we in this case omit that element, which cannot indeed give the belligerent the advantage of any new principle of law, but may, as a matter of evidence, justify what would be otherwise an excess of hostile action; that "private reason," which any state may have "to suppose, that their confidence in the good faith of the neutral State has a doubtful foundation." Now in the present case we may say we entertain no hostile intentions to the United States, but it is not for us to say conclusively that they have no ground to anticipate such unfriendly designs: and, certainly, while our Government has preserved a strict and irreproachable neutrality, a sometimes undisguised, and sometimes less open, but still apparent, ill-will on the part of a considerable portion of the people, in this case not altogether groundless and unprovoked, but none the less a cause for suspicion, must, in a free country, be allowed to be a circumstance not without weight; for it may well justify a foreign Government in guarding with more than usual care, against the possible effects of disclosures injurious to their interests, or false allegations which they could not officially answer, made to the Government and the people by the Envoys of a hostile power. The detention, therefore, of the Envoys, for the purpose of examining into the character of their mission, was justified by the fact that they were proceeding on a public mission, (which is I think a fact beyond dispute), and this right was fortified by the existence of circumstances, making

it probable that their mission was of a hostile nature.

But does the fact that the vessel was proceeding homewards from a neutral port, bar the right which would otherwise arise? It may be answered—No—for that the destination was a neutral port is already shown to be immaterial. That the vessel was proceeding *from* a neutral port, the case of the "Caroline" shows to be also of no weight. If then neither the commencement, nor the destined end, of a voyage can separately protect against detention, it would be hard to show that the two combined have that force. These are circumstances which may affect the question of forfeiture, as matters of evidence, or rather, as raising a presumption against or in favour of the Master; but which do not privilege the vessel from arrest. It is in this way they are treated by Lord Stowell in the case of the "Rapid," Edw. 228, where he says, speaking of the Master, "His caution must be proportioned to the circumstances under which such papers (public dispatches) are received. If he is taking his departure from a hostile port, in a hostile country, and still more, if the letters which are brought to him are addressed to persons resident in a hostile country, he is called upon to exercise the utmost jealousy with regard to what papers he takes on board. On the other hand it is to be observed that when the commencement of the voyage is in a neutral country, and it is to terminate at a neutral port, or, as in this instance, at a port to which, though not neutral, an open trade is

allowed, in such a case there is less to excite his vigilance, and therefore, it may be proper to make some allowance for any imposition which may be practised upon him."

This case, where the vessel was proceeding from a neutral port to an open hostile port, considered in connection with the above cited observations, is a direct authority for the proposition, that a vessel going between two neutral ports, and carrying official hostile papers, is liable to detention; and, therefore, that unless there be something further in this case, the "Trent" was liable to be so detained.

This conclusion is apparently opposed by the case of the "Hendric and Alida," which has recently appeared in the "Times" (Dec. 26 and 27); but that case was decided by a Judge of less reputation than Lord Stowell, and must rather be held to *be* overruled by, than to have overruled, the current of later decisions. It is further to be observed that the judgment in that case appears to have proceeded on the ground that "the Dutch had a right to carry in their own ships to their own colonies or settlements anything they pleased, whether arms or ammunition, *or any other species of merchandize.*" It would seem then that the question of whether the *officers* could be contraband of war, was never considered; but, if it was, then the judgment, laying down generally that where the destination of the vessel is a neutral (its own) port it cannot be confiscated for carrying contraband of war, although

true with respect to arms and ammunition (the "Imina") is shown by the later cases already cited not to be law if applied to dispatches, and by parity of reasoning, to envoys. And indeed at that time it was not clearly settled what, beside arms and ammunition, was contraband of war; for, not only did Lord Stowell include in that class many kinds of merchandize not before included, but the law with respect to dispatches was only laid down at a comparatively late period, as may be seen by his observations in the case of (I think) the "Atalanta."

That the vessel need not be chartered by the enemy to make it liable even to forfeiture, is abundantly evident from the cases of the "Susan" and "the "Hope," already referred to. But does the character of the vehicle in this case, as being a Postal Packet, make any difference? Mr. Lawrence's note to Wheaton, so much relied on lately, is to no purpose here; for even if the dispatches (if there were any), were carried by the Master in the ordinary discharge of his Postal service, which I imagine they were not (for were they like the rest of the letters in charge of the Admiralty Agent?) certainly this was not the case with the envoys, who are the "res" in question. The authority and the reason of that note both failing, is it the fact that it was a Royal Mail Packet that makes the difference? If it was a public ship there is an end of the question, for then no right even of search exists. But no such pretence has been, or can be made, with

respect to a vessel not even chartered by the Crown, and which is manned and commanded by a crew and captain, the servants of a private company, which takes such passengers as it pleases.

Yet the fact is not without importance, for the character of the vessel as a Postal Packet, and still more as a Royal Mail Packet, may well afford a reason why it should be excused from going into port for examination, but should, on rendering up the noxious articles, be allowed to proceed on its voyage. If ever such a proceeding would be right, this is the very case.

But can such a thing be done? It is urged that the captor has no right to remove any person or thing from the captured vessel until after condemnation. To this the case of the "Atalanta" will furnish an answer; for in that case several of the passengers, and their luggage were removed into the captor's ship during the voyage home. But it is said that on the property so removed no judgment can be pronounced, unless the ship be present. That there *can* be such a judgment is clear, from the stipulations of, for instance, the treaty of 1788, between the British Government and the States General; whereby it is provided (Art. 7), that "if not the whole, but part only of the lading consists of contraband or prohibited commodities, and that the master of the ship shall be willing and ready to deliver them to the captor who seized the same, in that case the captor shall not compel the ship to go out of her

course to any port he thinks fit, but shall forthwith dismiss her, and upon no account hinder her from freely prosecuting her designed voyage." It was, I suppose, intended that contraband so taken should be condemned modo et formâ, and not appropriated by the captor, by the leave only of the master of the captured vessel, whose interest it might well be to forego his right to freight upon a part of a cargo which was not his, (as would often be the case,) in order to preserve himself, and the owners of the residue of the cargo, from the delay and expense which would be caused by going into port to try the right. Such a portion of the cargo then might have been condemned by the Admiralty Court, although the ship was absent; and yet the clause of the treaty quoted does not afford a negative inference, that, but for such a stipulation, no such judgment could have been pronounced; since the object of the clause is to *forbid* the captor from detaining the captured ship:— rather, by not providing expressly for any extension of the Admiralty jurisdiction, it implies that there was no obstacle to giving effect to the terms of the treaty. Perhaps from the provision in the same article, (that if on the captured vessel showing certain *cocquets in due form*, therein referred to, it should be discovered that she was laden with contraband of war, the captor should not break open the hatches of such ship, nor unlock or break open the chests, mailpacks, or casks in the same, nor convey away any the least part of the merchandise,

before the whole be first landed in the presence of the Admiralty, and inventoried; nor should it be in any ways lawful to sell, exchange, or otherwise to alienate the same, until such prohibited goods were rightfully and lawfully proceeded against, and that the Judges of the Admiralty had by their respective sentences confiscated the same), an inference might be raised that the acts so provided against were otherwise not an unlawful mode of proceeding. But, without relying on this, the case of the "Atalanta" seems sufficiently strong; for can it be supposed that if the captured vessel had in that case gone to the bottom, the jurisdiction of the Admiralty over the remaining portion of the cargo would have been ousted. From the entire omission by Lord Stowell of any censure on the proceedings I have referred to, although he states them in detail, (and also, I should have thought, from the frequent practice in war), it may be argued, that whenever any reasons of necessity or great convenience arise, such a practice may be resorted to. Nor is there any reason why the envoys should not have the same right to bring the question before the Court, which the owner of contraband would have in a case occurring under the treaty above referred to, or in a case where the vessel had been lost and part of the cargo saved, or where, as might well happen, the owners of the vessel carrying it refused to defend. Whether the captor is bound by law to carry the vessel in or not, it is

equally in his power to commit illegal acts of oppression; in either case those acts will equally be illegal, and a wrong. He ought certainly to carry in the captured goods without delay, that there may be a speedy decision; he may in either case refuse to do so, but there is in both cases a remedy for the parties aggrieved. Without, therefore, denying that the *rule* is, that the vessel must be taken in (at least, if that is demanded by the master), an exception to that rule may well arise where there is a strong reason of necessity or convenience for departing from that practice, to be judged of in the same way as the question, whether there has been undue delay. And in this case there is this additional reason for admitting such an exception, that its reason is one applicable to a distinct class of cases. It is further said that a right to the goods only follows the condemnation of the ship; but this is not only inconsistent with the provisions of the above-cited treaty, but with such cases as that of the "Caroline," where the ship was not condemned at all (except in costs, being pronounced perfectly innocent), but both ship and cargo were restored. But what became of the dispatches? Were they ever adjudicated upon separately, or did they follow the ship, or were they ever restored? It would be hard to believe it, if they contained matter injurious to the British Government.

Nor can I see any reason why they should, or why any judicial sentence was needed: for they stand on

a wholly different footing from ordinary contraband of war. When a public ship of war is captured, no adjudication is necessary, and this is the property which dispatches appear most to resemble. It is not private, but Government property, of a peculiarly public nature; not an adventure of goods to be sold to the enemy for hostile purposes, but a thing essentially and by its very nature hostile; a thing therefore not requiring the adjudication of an Admiralty Court, but a matter only to be settled by the Governments. Such appears to have been the practice in the case of the "Madison," where the dispatches (which were in that case of a neutral character, though from an enemy), were at once handed over to the Government, and were never even seen by the Admiralty Judge. So, had the "Trent" been brought in for adjudication, and the judge had been of opinion that it was no case for forfeiture in any view, then, on proof that the envoys were persons going on a public mission, a judgment like that in the case of the "Madison" would have been pronounced, and the case would have been at an end. From such reasoning it might be without violence inferred, that if a belligerent Government, so capturing enemies' persons or dispatches, as these envoys have been captured, should offer to the neutral State from the ship of whose subject they were taken, reasonable evidence that they were public dispatches of a hostile nature, or, (if persons) that they were not persons who, even

though invested with a military character were travelling merely on their own account and for a private end, but persons going on a public mission with hostile designs; it is all that can be required. Or, if the envoys should be considered entitled to disprove their public character before the usual tribunal, this would be the utmost they could claim, or the British Government demand on their behalf. One so reasoning might reply to the challenge—Who then is safe if such a right is admitted? That some faith must be reposed in the public honour of National Governments—that if the right of search, the most indisputable of all belligerent rights, were exercised in all its extent, it would become intolerable—that if rights are used not honestly for the purpose of self-protection, but for the purpose of annoyance and insult, the only appeal is to arms; but that no injurious consequences can be drawn from an act, taken upon suspicions so well grounded, and so amply verified by the result.

But, whether he was right or wrong in the previous conclusions, he would surely be at least justified in saying—that it is no case for a peremptory demand and a haughty refusal of arbitration; but that it is a matter of fair doubt, and one eminently fit to be determined by some third party, who might represent that civilized world to whom International Law belongs. Yet such an American might also well concede, that it would be no sacrifice of the dignity of his country, if, in a case of so much doubt,

and so much contested, the Government of the United States should consent to hand over the captives to the British Government, whose honour would be engaged to hold them in strict seclusion and custody while the Appeal was pending, and to dispose of them finally according to the decision of the Arbitrator.

THE END.

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